Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3608

Appeal MA17-425

County of Lanark

May 24, 2018

Summary: The County of Lanark (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of emails between a councillor and residents relating to the county's roadside spraying program. The county denied access to the emails on the basis that it does not have custody or control over them. The requester appealed. The adjudicator upholds the county's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1).

Orders and Investigation Reports Considered: Orders MO-2821, MO-3287, MO-3281, M-813, and MO-2824.

Cases Considered: *St. Elizabeth Home Society v Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.); *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

BACKGROUND:

[1] The appellant made a request to the County of Lanark (the county) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> All 500 emails between [a named individual] in his capacity as Tay Valley Township Reeve and County Councillor and Drummond/North Elmsley residents relating to the county's roadside spraying program.

[2] The county issued a decision in which it indicated that it was unable to provide the appellant with the requested records, stating

> Upon receipt of your request, I made contact with [the named councillor] to inquire whether he has the ability to supply the requested emails, based on the fact that the said emails were sent to his personal email address, and do not exist on the county or township email service, therefore are not considered to be records of our institution. [The named councillor] did confirm that all emails were in fact deleted and are no longer available.
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> As a result, I must confirm that I am not able to provide you with the requested documents due to the fact that there are only two occasions where a Councillor's records are subject to MFIPPA:
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> 1. a councillor is acting as an officer or employee of the municipality, or performs a duty assigned by council, such that they might be considered part of the institution, or
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> 2. the records are in the custody or control of the municipality.

[3] The appellant appealed the county's decision to this office. The appeal could not be resolved during mediation and the appellant asked that it proceed to adjudication, where an adjudicator conducts an inquiry under the *Act*.

[4] During my inquiry, I sought and received representations from the councillor as an affected party, then the appellant. I also initially invited the county to make representations but it did not do so. The parties' representations were shared with one another in accordance with this office's *Practice Direction 7: Sharing of Representations*.

[5] In this order, I uphold the county's decision that the emails requested by the appellant are not within the county's custody or control, and I dismiss the appeal.

RECORDS:

[6] The records at issue are emails between the affected party (the councillor) and residents relating to the county's roadside spraying program.

DISCUSSION:

[7] The only issue in this appeal is whether the emails are "in the custody" or "under the control" of the county under section 4(1) of the *Act.*

Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[8] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[1]

[9] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[2] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[10] The courts and this office have applied a broad and liberal approach to the custody or control question.[3] Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[4] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other factors may apply.

- Was the record created by an officer or employee of the institution?[5]
- What use did the creator intend to make of the record?[6]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[7]
- Is the activity in question a "core", "central" or "basic" function of the institution?[8]

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[1] Order P-239 and *Ministry of the Attorney General v Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[2] Order PO-2836.
[3] *Ontario (Criminal Code Review Board) v Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.
[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] Order 120.
[6] Orders 120 and P-239.
[7] Order P-912, upheld in *Ontario (Criminal Code Review Board) v Ontario (Information and Privacy Commissioner)*, cited above.

- Does the content of the record relate to the institution's mandate and functions?[9]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[10]
- If the institution does have possession of the record, is it more than "bare possession"?[11]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[12]
- Does the institution have a right to possession of the record?[13]
- Does the institution have the authority to regulate the record's content, use and disposal?[14]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[15]
- To what extent has the institution relied upon the record?[16]
- How closely is the record integrated with other records held by the institution?[17]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[18]

[11] The following factors may apply where an individual or organization other than the institution holds the record:

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[8] Order P-912.
[9] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.
[10] Orders 120 and P-239.
[11] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[12] Orders 120 and P-239.
[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[16] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[17] Orders 120 and P-239.
[18] Order MO-1251.

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[19]

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record?[20]

- Who paid for the creation of the record?[21]

- What are the circumstances surrounding the creation, use and retention of the record?[22]

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[23]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?[24] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?[25]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[26]

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[19] PO-2683.
[20] Order M-315.
[21] Order M-506.
[22] PO-2386.
[23] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[24] Orders M-165 and MO-2586.
[25] *Walmsley v Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[26] Order MO-1251.

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[27]

[12] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[28]

[13] In *Canada (Information Commissioner) v Canada (Minister of National Defence)*,[29] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

The councillor's representations

[14] I notified the councillor named in the access request of this appeal and he provided representations. The councillor submits that the emails at issue were sent to his personal email address in confidence by local taxpayers within his own community and others. He believes that the intent of the mails was to enable him, in his capacity as a local Reeve appointee to County Council, to make an informed decision on a staff report with respect to the proposed roadside spraying program. He submits that he deleted all of the emails before the access request was received. He argues that in any event the emails were never in the custody or control of the county.

The appellant's representations

[15] The appellant explains that Lanark County was in the process of deliberating a Vegetation Management Plan which included use of roadside pesticide spraying, a highly controversial practice in some areas of Lanark County. The county received a lot of correspondence in opposition to roadside spraying and council heard several delegations. When council was deliberating the approval of this plan, the councillor told council that he had received 800 emails from the Municipality of Mississippi Mills residents, 500 emails from the Township of Drummond/North Elmsley residents and 30 emails from the Township of Montague residents in opposition to roadside spraying. According to the appellant, this volume of emails is unprecedented. He believes that the councillor referred to these emails in an attempt to influence the vote on the Vegetation

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[27] Order MO-1251.
[28] *City of Ottawa v Ontario,* cited above.
[29] 2011 SCC 25, [2011] 2 SCR 306.

Management Plan.

[16] The appellant argues that the councillor was acting as an officer of the county in the role of a policy maker. He also argues that the volume of emails suggest that this is an "unusual circumstance" in that such a large number of residents in other municipalities of the county saw fit to contact this one councillor. The appellant argues that this suggests that the public saw the councillor as acting as an officer of the county.

[17] The appellant submits that the emails are more than "constituency records" such as communications dealing with fences or barking dogs, or "political records" which are usually exempt from disclosure. In the appellant's submission, the latter records do not relate to policy formulation and decision making, whereas the emails in question here were used in the development of public policy.

[18] The appellant submits that previous rulings of this office have confirmed that "records that arise out of the councillor's official responsibilities as a member of council or some aspect of council's mandate" are subject to access laws, even if they are located on a private device.

[19] The appellant submits that county council's deliberation and ultimate approval of the Vegetation Management Plan are evidence that the emails were directly involved in county business and that the councillor was directly involved with key decisions being discussed, including the use of public funds and resources.

[20] The appellant argues that it is a core principle of government that elected officials are accountable to those who elect them and that participation in the political process is intended, by default, to be in the open.

[21] The appellant also makes submissions on the application of the above-listed factors and the test in *National Defence*. I will refer to those submissions as necessary below.

Analysis and findings

[22] The term "institution" is defined in section 2(1), and includes a municipality. The definition of "institution" does not specifically refer to elected offices such as a municipal councillor.

[23] In *St. Elizabeth Home Society v Hamilton (City),*[30] the Ontario Superior Court of Justice described the relationship between a municipal council and its elected members as follows:

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[30] (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

> It is [a] principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. Elected members of council are not employed by or in any way under the control of the local authority while in office.... Individual council members have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting; with the exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties.

[24] In Order M-813, the adjudicator reviewed this area of the law and found that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or

- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.

[25] The courts and this office have taken a broad and liberal approach to the custody or control question.[31]

Factors relevant to determining "custody or control"

[26] As noted above, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution.[32] The list is not intended to be exhaustive; some of the listed factors may not apply in a specific case, while other factors not listed may apply.

[27] Based on consideration of these factors, several previous orders of this office have found that municipal councillors' communications were not in the custody or under the control of the municipality in the circumstances of those appeals.[33] For example, in Order MO-2821, communications between City of Toronto councillors about cycling issues were found not to be under the control of the city. In that appeal, the adjudicator distinguished between city records, on one hand (which would be subject to the *Act*), and personal or political records, on the other (which would not), and found

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[31] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.
[32] Orders 120, MO-1251, PO-2306 and PO-2683.
[33] See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

the records at issue to fall in the latter category.

[28] The adjudicator also commented generally on the nature of records held by municipal councillors:

> Before concluding, I wish to address the question of "constituency" records. The parties made reference to this description of councillor records, as prior decisions of this office have found councillors' constituency records to be excluded from the *Act.* One of the factors the appellant relied on in her Appeal Form is that the records do not involve any individual constituent. She suggests, therefore, that the records must therefore be "city records."
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> Although the distinction between "constituency records" and "city records" is one framework for determining custody or control issues, it does not fully address the activities of municipal councillors as elected representatives or, as described in *St. Elizabeth Home Society*, above, "legislative officers." Records held by councillors may well include "constituency records" in the sense of having to do with an issue relating to a constituent. But they may also include communications with persons or organizations, including other councillors, about matters that do not relate specifically to issues in a councillor's ward and that arise more generally out of a councillor's activities as an elected representative.
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> The councillors have described such records as "personal" records but it may also be appropriate to call them "political" records.

[29] In Order MO-3287, I found that emails passing between a City of Vaughan councillor and a former councillor were not in the custody and control of the city. I found that in the circumstances of that appeal, there was no reason to believe that such records would be anything other than personal or political records of the councillor. I also found that the fact that the city's servers may have been used to send the emails (if they existed), taken alone, was not enough to establish that the emails were in the city's custody or under its control.

[30] Other orders have applied the factors mentioned above and the two-part test set out in *National Defence* and have concluded that a councillor's records are in the custody or control of a municipality. For example, in Order MO-3281, I found that a city councillor's email to an investigator setting out potential terms of the investigator's hiring by the city was under the control of the city. I found that the email contained, in effect, negotiations with the investigator on behalf of the city, and that therefore the city could reasonably expect to obtain a copy of the email upon request.

[31] Whether a councillor's records are within a municipality's custody or control depends on contextual factors including the circumstances of their creation and use. For

the following reasons, I find that the emails at issue in this appeal are not in the custody or control of the county. I will begin with a consideration of the above-listed factors, then will turn to the two-part test in *National Defence*.

Application of the above-listed factors considered by this office in determining custody and control

[32] As noted above, this office has developed a list of factors relevant to whether a record is in the custody or control of the institution. Several of them are relevant here.

[33] First, I find that the councillor was not acting as an officer or employee of the county when the emails were created. As noted above, in *St. Elizabeth Home Society v Hamilton (City)*,[34] the Ontario Superior Court held that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. In Order M-813, the adjudicator concluded that only in "unusual circumstances" is a councillor considered an officer of a municipality and therefore part of the institution for the purposes of the *Act*. I find that there are no "unusual circumstances" present in this appeal such that the councillor should be considered an officer of the county. There is no evidence, for example, that the emails that the councillor received about the roadside spraying program were a result of a special duty assigned to the councillor by council.

[34] Since the councillor was not acting as an employee or officer of the county at the time in question, he is not, in the circumstances, considered to be part of the county. However, that does not end the analysis of whether the emails are in the custody or control of the county and therefore subject to the *Act*. I must now consider whether the emails are in the custody or under the control of the county on the basis of the other above-listed factors.

[35] I find that the emails were not created in the conduct of county business. The appellant submits that the emails relate to a "core", "central" or "basic" function of the county as they relate to proposed municipal work within its road allowance. However, I find that although the emails clearly relate to county business in a broad sense, the issue, for the purpose of determining custody or control, is not the subject matter of the emails but rather whether the communication represents the exercise of a decision-making or executive function by the councillor on behalf of the county. The councillor here was doing what councillors typically do, which is to communicate with constituents and others on issues of interest to them. There is no evidence that the county itself nominated the councillor to be the town's designated point person for communications about the roadside spraying issue. Based on the information before me, the emails would appear to have been exchanged squarely within the political or constituency context.

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[34] *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

[36] In terms of the use to which the emails were put, the appellant submits that the councillor used them in order to voice opposition to a proposed county program and to sway the council vote. However, this submission does not necessarily favour a finding that this is the type of record over which the county has custody or control. Emailed submissions to a councillor which are intended to influence the councillor's vote on an upcoming matter are, in my view, the sort of constituency or political record discussed in Order MO-2821, cited above, which is distinct from a record of the county as an institution.

[37] Another one of the factors considered by this office is whether the institution has possession of the record. The councillor in this appeal submitted that all of the emails were sent to his personal email account. I understand this to mean that they were sent to an account other than an official councillor account located on the county's servers.

[38] The fact that the emails are not located on the county's servers is not determinative of whether the county has custody or control of the emails.[35] On the facts of this case, what is more significant is my finding that the emails were not generated by the councillor in the conduct of county business.

Test in National Defence

[39] I have also considered the test articulated in *National Defence*,[36] cited above, where the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[40] As noted in previous orders of this office, there is considerable overlap between the factors relevant to the analysis under the *National Defence* test and the factors considered previously by this office and listed above.[37]

[41] With respect to the first question, I find that the emails related to a matter within the county's mandate, i.e. the roadside spraying program. In this respect, it is arguable that these communications relate to a "county matter" within the meaning of part one of the test in *National Defence*. This would be taking a broad and liberal view of what constitutes a "county matter" for the purposes of the custody or control question. In my view, however, and as I have stated above, the important question is not the subject

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[35] See Order MO-3281, discussed above.
[36] 2011 SCC 25, [2011] 2 SCR 306.
[37] See, for example, Order MO-2821 and MO-3281.

matter of the emails but whether the communication represents a decision-making or executive function exercised by the councillor on behalf of the county. The context of the creation of the record is important in determining what constitutes a "county matter". In my view, and as noted previously in this order, the emails do not relate to a "county matter" because they do not represent a decision-making or executive function exercised by the councillor on behalf of the county.

[42] With respect to the second question, however, even if the contents of the records relate to a "county matter", I find that the county has no authority to compel the production of the records at issue or to otherwise regulate the use and disposal of them by the councillor's office. Here, I disagree with the appellant's submission that the county has a right of possession of the records. The communications relate to the councillor's role as an individual constituent representative and are in the nature of constituency or political records, rather than county records. In coming to my conclusion that the county could not reasonably expect to receive a copy of the emails upon request, I having considered the following:

- The emails were created by and exchanged between a councillor and local residents, all of whom are neither officers nor employees of the county
- There is no evidence that the emails relate to the discharge of any special authority to act on behalf of the county
- There is no evidence that the records were integrated with county records

[43] I find, therefore, that even if records of this nature relate broadly to a "county matter," the county does not have the authority to regulate the use or content of any such records, and could not reasonably be expected to obtain a copy of such records upon request.

[44] The circumstances, therefore, do not meet the second part of the test in *National Defence* for a finding of county control over the records.

[45] Finally, I acknowledge the appellant's argument that elected officials are accountable to those who elect them and that participation in the political process is intended to be in the open. In this regard, I agree with the comments made by the adjudicator in Order MO-2821, cited above:

> In any event, it is consistent with the scheme and purposes of the *Act,* and its provincial equivalent, that [councillors'] records are not generally subject to access requests. In *National Defence,* the Court stated that the "policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues" and agreed with the submission that "[i]t is the process of being able to deal with the distinct types of information, including information that involves

> political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office.
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> The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP's or MP's without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act.* A finding that the city, as an institution covered by the *Act,* is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

Conclusion

[46] Having considered and applied the various factors previously considered by this office, as well as the test in *National Defence,* I find that the records at issue are not in the custody or under the control of the county. They are the personal and/or political records of the councillor's office relating to the councillor's activities as an elected representative.

ORDER:

I uphold the county's decision and dismiss the appeal.

Original Signed by: May 24, 2018

Gillian Shaw
Senior Adjudicator